UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376 (Colt's Manufacturing Company)

and

Cases 34-CB-2631 34-CB-2632

GEORGE H. GALLY, an individual.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (New York University)

Case No. 34-CB-3025 (formerly 2-CB-20730)

And

SOLO J. DOWUONA-HAMMOND, an individual

RESPONDENT UAW'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE NLRB DECISION IN MACHINISTS LOCAL LODGE 2777 (L-3 COMMUNICATIONS) 355 NLRB NO. 174 (AUGUST 2010)

I. INTRODUCTION

On August 12, 2003, a complaint issued in Cases 34-CB-2631 and 2632, alleging that the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW and UAW Local 376 (herein "UAW" or "Union") violated the Act by failing to recognize George Gally's objection made pursuant to *CWA v. Beck* for a three year period.

On August 30, 2007, the above referenced cases were consolidated with Case 2-CB-20730 (now known as 34-CB-3025) alleging that the UAW failed and refused to recognize Dowuona-Hammond's objection made pursuant to CWA v. Beck as a continuous objection.

A hearing was held and on March 3, 2008, the ALJD issued finding the UAW violated the Act.

On April 29, 2008, the UAW filed exceptions to the ALJD. Then, on August 27, 2010, the NLRB issued the decision in Machinists Local Lodge 2777 (L-3 Communications). That decision found the International Association of Machinists and Lodge 2777 violated the Act when they refused to allow Robert Prime to make an annual objection under CWA v Beck. Machinists Local Lodge 2777 (L-3 Communications), 355 NLRB No. 174 (2010).

In the *Machinists* decision, the NLRB held that "absent a more compelling rationale or other procedures that minimize the burden of annual objection not present in this case, a union violates its duty of fair representation if it declines to honor" continuous objections of nonmember employees. (Emphasis added.) *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174, slip op. at 8 (2010).

Specifically, the NLRB examined "whether the union [] demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors." (Emphasis added.) *Id.* The Board found that the Machinists' unions acted arbitrarily when they did not honor a request for continuous objection. *Id.* Slip Op. at 6.

On October 20, 2010, the NLRB granted the parties in the instant case permission to file supplemental briefs in response to *Machinists*.

II. FACTS

The UAW incorporates all facts presented in its Exceptions to the ALJD and Brief in Support.

The UAW accepts a *Beck* objection in any written form. It accepts the objection via mail or hand delivery. It accepts objections any day of the year. *TR* 116-117. The UAW *Beck* objection processes do not include a window period for filing objections. *TR* 123.

Once received, the UAW mails an initial letter or "new objector letter" to the *Beck* objector acknowledging receipt of the objection. This letter notifies the objector as to the date of expiration ("DOE") of their annual objection. The DOE is prominently displayed at the top of the letter adjacent to the objector's name and address. *TR* 123. The DOE is the month in which an objection is received, one year later. *TR* 168. The last paragraph of this letter refers the objector to the DOE and its location in the letter, provides all the information necessary for the renewal of an objection, and explains the annual renewal process. That process is simply to write an objection letter and send it to the address supplied. *TR* 123. *R* 15.

Notice is also sent to the objector's employer so that the employer is aware of the reduced check-off and can adjust the payroll system accordingly. This letter informs the employer of the effective month and year of the objection. The letter further states that the "UAW will not insist upon payment by the below-

referenced person of more than the appropriate fee allowed by *Beck* for the remainder of the 12 month period during which that person's objection continues in effect." *R* 16. This letter is copied to the objector. *TR* 123. R 16. Similarly, when an objector continues his/her objection, an acknowledgement letter is sent providing the same information described above to objector and employer. *TR* 131. *GC* 2-G Subset I. Practically all objectors utilize the payroll deduction system as the method of paying their union security obligation. *TR* 129.

Fifteen days prior to the expiration of an objector's annual renewal period, that is, fifteen days prior to the DOE, the UAW sends out a reminder letter to the objector. This letter "reminds" the objector of his/her DOE. It further informs the objector as to how to renew his/her objection, i.e., write a letter and mail it to the Agency Fee Payer Objection Administration, and provides the address. Finally, the letter informs the objector that his/her union security obligation will increase to 100% of regular dues if he/she chooses not to object and notes that he/she may object at any time in the future. *TR* 155-156. *R* 17.

If an objection is not received then two to three weeks after the DOE, a second letter is sent to the objector. That letter is a copy of a letter sent to the employer informing it that the employee has chosen not to renew his/her annual objection and to increase the payroll deduction to 100%. *TR* 138-139. *R* 27. If an objection is thereafter filed within a reasonable period, the objection is processed without a break in continuity of objection. *TR* 139.

Each May or June, each objector is mailed a copy of the Report of Expenditures Incurred in Providing Collective Bargaining Related Services ("Report"). In the last paragraph of the letter introducing the Report the UAW reminds the objector that his/her objection "expires on the date indicated as your "DOE" on the first page of this letter adjacent to your name and address." The letter continues describing the process for renewal. *TR* 186. *R* 23. *GC* 2-C Subset G.

In compliance with a settlement agreement with the NLRB in 1992, the UAW has agreed to supply an annual notice — or Beck notice - to every employee of every employer with which it has a contract. *TR* 142. *GC* 2-C Subset V. This notice contains the new annual chargeable amount, notification of the one year annual renewal period and a description of the process for renewal — a writing mailed to the Agency Fee Payer Objection Administration, and provides the address. This notice is produced in Solidarity magazine and mailed each August. *TR* 128-130. *GC* 22.

At trial, the UAW produced data to show that roughly 60% of objectors renew their objection each year. *R* 19. In December 1992, the UAW had 289 objectors. That year, 107 objectors did not continue their objections. After receiving a copy of the *GC* 2 C, Subset J letter 11 reinitiated their objector status. The percentage of objectors that did continue their objection in 1992 was about 60%. A look at *Beck* objectors for the year 2007 produced consistent results, about 60% of objectors continued their objection. Of 353 objectors for roughly the year 2007, 210 objectors continued their objections as of October 17, 2007. In this time period then, the rate of continuing objections was about 59.5%. *TR* 161-62. The UAW had very close the same percentage of renewals for the

¹ Mr. Gally is not listed in R 19. Mr. Hammond is listed in R 19. TR 163.

period October 5, 2006, to October 17, 2007, as reported in the 1992 comments to the NLRB. *TR* 166, *GC* 2 C Subset B. This number is very typical of the number of renewals each year. *TR* 170.

III. ARGUMENT

The UAW incorporates all arguments presented in its Exceptions to the ALJD and Brief in Support.

A. The UAW annual *Beck* objection requirement is lawful because the procedures further minimize any burden imposed on objectors.

As Member Pearce points out in his dissent, actions of a union can be considered arbitrary, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." (Emphasis added.) *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45 (1998)(emphasis added)(quoting *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991)). In *Machinists*, the NLRB examined whether that union's actions in requiring annual renewal were arbitrary and, therefore, a violation of its duty of fair representation. In determining whether the unions' actions in Machinists were arbitrary the NLRB considered the balance between "the legitimacy of the union's asserted justifications for its procedures and the extent to which they burden employees' assertion of a *Beck* objection." *Machinists Local Lodge 2777 (L-3 Communications*), 355 NLRB No. 174, Slip Op. at 3 (2010).

The NLRB determined that the Machinists' unions annual renewal requirements were not justified in light of the burdens placed on the potential

objector. The Machinists' union's objection procedures require an objector to send a statement of objection to the union each year during a one month window period. The Board found the requirement of mailing an objection to be minimal. However, it did find more burdensome:

- 1. The requirement of "remembering" to mail the objection;
- 2. During a one month window period; and,
- The loss of an opportunity to object for 11 more months.
 Id. Slip Op. at 4.

The Machinists' unions process was found burdensome not because it required an objector to mail a writing but because the process required the objector to "remember" to mail the objection. The Machinists' unions notify their membership of the Beck objection annual renewal procedure with the publishing of the procedure, along with notice of rights under Beck, in the International Association of Machinists ("IAM") magazine. This issue of the IAM magazine is mailed to all membership annually. Id. Slip Op. at 1. In contrast, the UAW provides six separate notices to Beck objectors, at various times of the year, regarding their obligation to annually renew their objection. Machinists' unions, the UAW provides each employee of every employer with a contract with the UAW notice of their rights and obligations under Beck in the UAW's magazine, Solidarity. The notice issue of Solidarity is mailed to every employee each August. Specifically, the notice informs each employee of how to object – a writing mailed to the Agency Fee Payer Objection Administration. While the notification of the annual renewal procedures of the Machinists' unions

ends there, the UAW has incorporated several safeguards into its annual objection processes which serve to remind the objector of the annual renewal process and when his/her annual objection expires.

When an objector files his/her initial objection, the objector is sent several letters informing him/her of the annual renewal process. An objector is sent an acknowledgement letter informing the objector her/his objection has been received and informing the objector of the annual renewal requirement. This letter notifies the objector of the expiration date of his/her annual objection and explains the annual renewal process. Around the same time, the objector also receives a copy of the letter sent to his/her employer notifying the employer of the objection and the reduced union security obligation. That letter further informs the employer that reduced fee remains in place for the 12 month objection period. This letter serves as another reminder to the objector of the annual renewal requirement and his/her expiration date.

Next, each May or June, the UAW mails to each objector the Report. Along with the Report, is the letter explaining the change in the annual percentage charged notably displaying the objector's DOE at the top of the letter across from the objector's name and address. The last paragraph of the letter explains the annual renewal process. Several months later, in August of each year, the annual notice in SOLIDARITY magazine, described above, is mailed out.

Then, fifteen (15) days prior to the expiration of the objection, the objector is sent a reminder letter notifying the objector of the expiration date of his/her

objection and the consequences of nonrenewal, i.e., the union security obligation will increase to 100%.

Finally, if an objection is not received the UAW notifies the employer that the employee has not renewed its objection and to increase the payroll deduction to 100% of dues payable. A copy of this letter is sent to the employee. This letter functions as a second reminder letter. If the employee chooses to then object within a reasonable period the objection period is continued without interruption.

In all, the objector receives six notifications of the annual renewal obligation at various time periods throughout the 12 month period, keeping the objector informed as to the simple annual objection requirements and the timing as to his/her individual objection renewal. Two of those notifications are mailed, one just before and one just after, the objector's date of expiration. The UAW's multi-layered approach is quite distinguishable from that of the Machinists' Union simple annual renewal requirement posted in the IAM magazine. The UAW's annual renewal process is active rather than passive in that it seeks to keep the objector informed of his/her rights and obligations to renew annually and when.

The second burden identified by the Board in *Machinists* is the unions' one month window period for filing of objections. Contrary to the burden of remembering to file an objection within the annual one month filing period, objectors are not so constrained by the UAW procedures for the filing of a *Beck* objection. Objections, under the UAW process may be filed at any time. A new objector, or an employee that simply wants to renew his/her objection after the

objection has expired, may file that objection at any time and it will be honored for the next twelve months. Thus, there is no "trap of the unwary."

The third additional burden identified in Machinists is the objector's loss of the ability to file an objection for another 11 months if the window period is missed. Under the UAW renewal procedures, an objector is not so burdened. An objector may deliver an objection to the UAW at any time. The objection will be honored for a twelve month period from the month of filing. Thus, asserted unwary can object at any time and continue their status as an objector. If an objector fails to continue his or her objection by their "DOE" and renews shortly thereafter, the UAW continues their objection without break. " ... [I]t's not worth our while to go back and collect 20-percent or 25-percent from a fellow for one month just because he was a little late, in doing that." TR 139.

The UAW annual renewal process addresses all the concerns the Board raised in Machinists that made their process burdensome. Objectors do not have to remember the date of their renewal. The UAW remembers it for them and reminds them. Twice. The objector does not have to file within a window period. He/She can file an objection at any time. Thus, objectors who change their mind can always file and their objection is valid twelve months from the date of filing. Objectors are not "caught" or "trapped" into paying dues for 11 months because there is no window period to miss. In finding a violation in *Machinists* the Board stated while the facts of this case proved a violation there may be other unions whose processes "minimize the burden of annual objection not present in this case." Slip op. at 8. The UAW annual renewal processes do just that. The

Board stated it would proceed on a case-by-case basis and consider "whether the union has [] otherwise minimized the burden it imposes on potential objectors." Slip Op. at 1. The UAW submits its annual renewal requirements do just that. Its procedures include safeguards that eliminate the additional burdens on objectors found by the Board in *Machinists*. Therefore, because the "features" of the UAW annual renewal procedures minimize any burden placed on potential objectors, the complaint should be dismissed.

B. The UAW has demonstrated legitimate justification for its annual renewal requirement.

"[U]nder the 'arbitrary' prong, a union's actions breach the duty of fair representation 'only if [the union's conduct] can be fairly characterized as so far outside a "wide range of reasonableness" that it is wholly "irrational" or "arbitrary."" *Marquez*, 525 U.S. at 45, quoting *O'Neill*, 499 U.S. at 78 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Whether a union's conduct is "irrational" must be determined "in light of the factual and legal landscape at the time of the union's actions," *O'Neill*, 499 U.S. at 67, and such a determination is proper only "when [the union's conduct] is without a rational basis or explanation," *Marquez*, 525 U.S. at 46, citing *O'Neill*, 499 U.S. at 78-81.

The UAW's annual renewal process is rational. There is no attempt to "catch" or "trap" an objector. As discussed more fully in the UAW's Brief in Support of its Exceptions, the UAW has legitimate reasons for its annual renewal policy. The underlying component of the UAW's annual renewal policy is the fact that the UAW gives annual notice to all employees so that they can decide,

based on the most current information, whether to object. At the hearing before the ALJ, the UAW produced data that showed roughly a 40% nonrenewal rate both in 1992 and again in 2006-2007. It is fair to extrapolate that the percentage of nonrenewals each year is roughly 40%. Since nonrenewal is not a function of a "window period" trap, as objectors can object at any time, the only fair inference is that nonrenewals are attributable to two reasons: employees leave bargaining unit jobs or employees decide not to continue as objectors. Therefore, the statistics show about 40% choose not to continue their objection for some reason. There is no "trap" in which to catch those that forget.

The Union's witness testified at trial, that, quite often some event triggers a higher or lower percentage of objectors. Once that event has ended or been attended to, those workers change their mind as to their objection. There was testimony to show that employees make a decision to object based on other reasons than ideological ones. *TR* 176-177. Objectors may make their objection based on a discrete event that may rectify itself in the next year. For example, *R* 19 shows such a situation. *R* 19 shows a spike in the number of *Beck* objectors at the Chrysler Jeep plant, represented by UAW Local 12 for a certain period of time. The Jeep plant normally has about 10 objectors. *TR* 174. However, many of those who objected did not renew their objection. Upon investigation, it was uncovered that one of the objectors had wanted to run for a local union office but had discovered nonmembers could not hold union office. *TR* 176. Word of that spread throughout the plant, and, as evidenced by *R* 19, a number of objectors chose not to renew their objection. *TR* 180-81. Therefore, it is not unreasonable

for a union to maintain an annual objection system because it is not unreasonable to assume that after the resolution of a specific issue, an objector may choose not to renew their objection the following year.

The UAW has collective bargaining agreements with over 1000 employers. TR 187-88. By requiring annual objections, the UAW knows with certainty, who is, and who is not, an objector each year. Annual objections provide a mechanism for the Union to maintain an accurate list of actual objectors versus employees that have left UAW represented employment, retired or died and to have up-to-date addresses for objectors. TR 185. The turnover rates in the newer units serviced by the UAW, such as hospitals, casinos, or universities, is much higher than in its older core industries. The turnover rates in service industries are close to 35 percent. TR 171-72. In academia for instance², employees may only teach for one or two semesters. TR 186-87. High turnover rates make it more difficult to keep track of information. As the UAW's Beck program is administered on a national basis, rather than locally, the Union needs a mechanism to keep their records up to date.³ Without up-to-date information, the Union is sending out Reports to employees, and their employers, that may have left the employers' ranks making the process time consuming, and costly, for all. Without an annual renewal requirement, the Union would have to institute another system to collect this data. Therefore, it is administratively rational for the UAW to maintain a requirement that allows it to gather accurate

 2 Mr. Hammond has been employed as an adjunct professor at New York University. $\it R$ 20, 22

The UAW's **Beck** procedures are handled on a national basis as opposed to at the local level. This is so because the turnover in local leadership would cause the Union to expend great amounts of time and money for training.

information so that the entire *Beck* notification procedure, crafted over many years, will work efficiently and economically. The UAW's annual renewal

requirement is rational, and therefore justified.

IV. CONCLUSION

In light of the above arguments, and those made in the Exceptions and

Brief in Support, the UAW requests that the Complaint in these cases be

dismissed.

Respectfully Submitted,

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By: /s/ Blair Katherine Simmons
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Dated: November 17, 2010

14

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CERTIFICATE OF SERVICE

The undersigned hereby certifies and declares that one (1) copy of the document referenced below was served as follows:

1. Document(s) served:

Respondent UAW's Supplemental Brief in Response to the NLRB Decision in Machinists Local Lodge 2777 (L-3 Communications) 355 NLRB No. 174

(August 2010)

2. Method of Service:

Electronic Mail and U.S. Mail

Served upon:

Service list attached

4. Date served:

November 17, 2010

I certify and declare under penalty of perjury that the foregoing is true and correct.

Lisa Polston

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